

AN ESSAY

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ON

THE LIBERTY OF THE PRESS;

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1799.

AN ESSAY

THE LIBERTY OF THE PRESS

BY JAMES M. HARRIS

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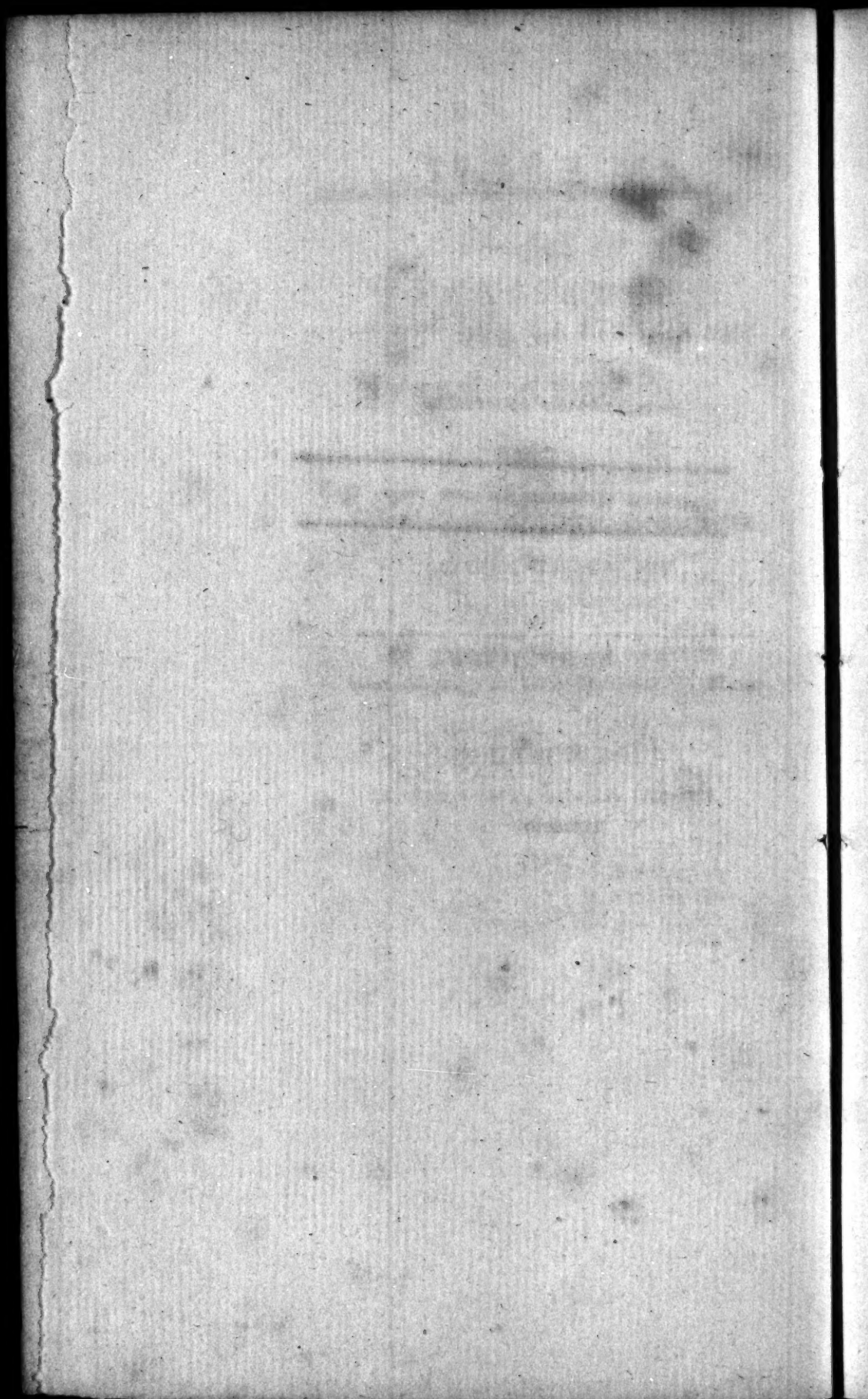
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THE UNITED STATES



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1871



TO THE
PRESIDENT
OF THE
UNITED STATES.

SIR,

THE observations contained in the following pages, are solemnly addressed to your conscience and to your judgment. My object is to demonstrate to the people, and to you, that the constitution of the United States, has been violated. The arguments which are used to effect this demonstration, are derived from the first and purest principles of political science, and are exhibited in that plain form, which truth alone can venture to assume.

If, Sir, these arguments shall excite in your mind, a doubt concerning the power of Congress, to define and punish libels, my purpose will be accomplished. The virtuous servant, of a free people, will not perform a single act of power, unless he is ab-

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solutely sure, that he is authorised to perform it, by that charter whose sacred precepts he has pledged himself to God and to his Country to observe. If, relying too much on the decision of an angry and agitated assembly, he has hastily given his assent to a measure, of which his judgment now compels him to question the propriety, disdaining all considerations, but those of truth and justice, he will come forward with the firmness which belongs to virtue, and acknowledge to the world, the real situation of his mind. In doing this, he will exhibit to mankind, an instance of rectitude and candor, which it has been seldom if ever their fortune to behold; and by this glorious homage, voluntarily offered to reason and to truth, he will promote the cause of liberty and virtue, and render his own name immortal. He will dispel solicitude and sorrow from the bosoms of thousands, whose patriotism is as pure as his own, and still the tumult that is now rising in the country, and which threatens to overwhelm the union with ruin and confusion.

I will not offend you, Sir, by saying that on this subject, you must entertain some doubt. It is possible that you may be absolutely sure, that the Congress of the United States does possess a power, which certainly is not expressly given, nor can be
shown

shewn to be necessary to carry any given power into effect. It is possible, that you may be absolutely sure, that you are in the right, although forty of the representatives of the people, equal at least in talents and integrity, and almost equal in numbers to their opponents, have told you that you are in the wrong. It is possible that you may retain this absolute conviction, in spite of the solemn decision of the respectable legislatures of Kentucky and Virginia. All this is possible, and if you shall say either by your words or actions, that it is actually the case. I shall not hesitate to believe you; but this belief will be accompanied with wonder, and the most profound regret.

Yet, Sir, however clear your opinion, however decided your conviction may be, on this great constitutional question, there is one point in which we must all agree. It is a truth, which cannot be denied, a truth supported by facts, as notorious as they are alarming, that the sedition bill is in the biggest degree dangerous and inexpedient. In this part of the world it is justly regarded as an attack on the liberty of the press, and has roused the attention of the most supine. It has inflamed that spirit of suspicion and discontent, which, unfortunately for the people, has been already too powerfully excited, and has a direct and obvious

tendency to produce the very crime which it professes to punish. God forbid that I should say, that such was the object for which the law was made. If I entertained an opinion so dishonorable to my countrymen, so disgraceful to humanity, my soul would sink with horror and despair. But I cannot despair. Truth, liberty, and virtue, must prevail in America, and I therefore, believe, that the servants of the people, will not continue a law, merely because it has passed, when they know, when they see, that the evil which it has already produced, infinitely outweighs all the good which they expected to obtain.

HORTENSIUS.

Virginia, January 5, 1799.



AN

AN ESSAY

ON THE LIBERTY OF THE PRESS.

PART I.

TO THE PEOPLE OF THE UNITED STATES.

IT is the object of the following address to demonstrate, that so much of the late act of Congress, commonly called the Sedition Bill, as relates to libels, is *not warranted* by the Constitution of the United States ; and that so much thereof as relates to *printed* libels, is *expressly forbidden* by it. To these two points, my observations will be exclusively confined.

The following principles, it is presumed, will be conceded. If the reader denies or doubts their truth, he need not proceed.

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The whole argument is founded on a supposition that they are true.

I. That all power originally belongs to the people.

II. That the powers of government are powers granted by the people.

III. That the individuals selected from the mass of the people, to administer the government, possess no powers, general or special, but those which are either expressly delegated or are *necessary* to carry a power expressly delegated into effect.

IV. That it has frequently happened in the course of human affairs, and may again happen, that the individuals thus selected may abuse the power entrusted to them, and may usurp more power than was meant to be entrusted to them.

V. That one abuse does not justify another, and that the usurpations of Congress cannot be vindicated by the encroachments of the State Legislatures.

VI. That the decision of a constitutional question, ought not, in any manner, to be affected by the conduct of France, or the opinions of Mr. Jefferson, or any other man, or men, in the world, but should rest on the immutable principles of reason and of truth.

It is on the ground of this last postulate, that no answer is given to the arguments,

ments, founded on opinions and writings ascribed to Mr. Jefferson, and to others; and on the same ground, the aid which might be obtained from the writings and speeches of Publius and other distinguished federalists, in support of the position now meant to be established, is totally rejected. It is the purpose of the present address, not to ascertain what *particular* individuals *have* thought, but what *all* men *ought* to think, concerning the powers of the government, and the freedom of the press.

1. If all power originally belongs to the people, those who exercise any portion of power, must derive their authority from the people, and can possess no power, that is not given, expressly, or by fair and necessary implication. To ascertain the precise portion of power, which they have granted, we must resort to the instruments or writings by which their intention to grant power is expressed. These instruments are the Constitutions of the several States, formed at a time when they were independent sovereignties, and the Federal Constitution, which unites all the States.

The State Constitutions preceded by several years, the formation of the Federal Compact. By these Constitutions governments

vernments were organized, and the Legislatures were intrusted with a *general* power to do what they might think the public good required. This power had been exercised in all the States, and the regulations, which it was thought the public good required, had been adopted. The rights of persons and things, public and private wrongs, which furnish all the materials for local and municipal law, had been accurately defined, and were well understood. *Adequate provision was made to secure reputation as well as liberty and life.* Still, however, a Federal Government was deemed essential, to the peace and happiness of the people of America; not because the State institutions were defective and required amendment, not because liberty was in danger, or because character was not sufficiently guarded from defamation, but because there were many important subjects on which the State Legislatures could not act with effect. They could not make effectual provision for paying the public debt, nor regulate Commerce, nor borrow money on the credit of the United States, nor establish a system of general defence. These were the great objects which could not be attained, but by means of a Federal Government, and for the attainment of these

these objects a Federal Government was instituted. The powers therefore delegated to this government were special and limited, and from the state of things could not have been otherwise.

Nothing can be more obvious, and nothing has been more generally admitted, than the distinction, between the principle which is the basis of the State governments, and that which forms the basis of the Federal Constitution. To the State governments, general powers of legislation are granted, and they may legislate on all subjects, except those on which they are expressly forbidden to act. To the Federal Government, specific powers only are given, and Congress can legislate on those subjects only on which they are expressly authorized to act. The State governments possess all powers, belonging to the people, except those expressly withheld: the general government possesses those powers only which are expressly granted, or are necessary to carry a power expressly granted into effect. When therefore a doubt arises concerning the constitutionality of a Congressional law, the first question ought regularly to be, is the power to pass this law expressly granted to Congress? If it be not expressly granted in plain words

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for that purpose, the next question must be—Is this law necessary to carry any power expressly granted into effect? If it be not necessary, there is an end of all doubt or difficulty on the subject, and the law is absolutely void.

Let the Sedition bill be brought to the test of an examination on these principles, and the result will be, that those clauses in it, which punish insurrection or *actual* opposition to the authorised measures of government, will be found warranted by the terms and meaning of the federal compact; because the best laws would be of no avail, unless Congress possessed a power to punish those who opposed their execution. The power of punishing acts of opposition to the laws, therefore, being necessary, to carry the laws themselves into due operation, is readily conceded to belong to Congress. But the inquiry pursued farther, on the same principles, will terminate in a conviction, that so much of the Sedition Bill as relates to libels on the government, or the individuals belonging to it, is not within the words or meaning of the Constitution. It will not be said that the power of punishing libels is expressly given. Several offences are enumerated which may be defined and punished by the general government; but libels are not included

cluded. If then the power of punishing libels is not expressly given, it cannot be exercised, unless it can be shewn to be *necessary* to carry some given powers into effect. What is the power expressly given, which is carried into effect, or is in any shape aided in its operation, by the power of punishing libels. Plain as this question is, it never has been answered. In fact it cannot be answered. Gallatin propounded it at the last session to the advocates of the Sedition Bill, with his usual perspicuity; but neither the eloquence of Otis, nor the ingenuity of Harper could be brought to encounter it!

One case more will completely illustrate the doctrine here inculcated. In 1792 Congress passed a law punishing with death persons concerned in robbing the mail, or stealing letters from the post office. If the enumerated powers of the government be examined, it will be found that the power to pass such a law is not expressly granted—still however it is warranted by the Constitution, because it is necessary to carry into effect the general power expressly granted to Congress, to establish post offices and post roads.

The position, that Congress can exercise no power that is not given expressly, or by *necessary* implication, tho' manifest-
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ly resulting from the nature of a federal compact, and supported by every fair and rational construction of the constitution, has, from excess of caution, been expressly recognized by the 12th article of the Amendments, which declares, "that powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

Solid as the foregoing principle is, and solemn as its recognition has been by the people of America, it has been boldly denied by some, and artfully evaded by others. It has been strenuously contended, that Congress had power to adopt all measures which they might think conducive to the general welfare. Mr. S. from South-Carolina was the first who openly proclaimed it as his opinion, that constitutionality and expediency were convertible terms.

Those who advocate this doctrine, endeavour to vindicate their conduct by resorting to the preamble, and to the 8th Section of the first Article of the Constitution of the United States.

But before the arguments drawn from these sources are noticed, it is proper to observe, that all reasoning on any proposition

tion, may be reduced into the form of a syllogism; and if the first and second terms be true, and the conclusion correctly stated, the demonstration sought for is obtained; and according to all the rules of logic, and the plain dictates of common sense, principles from which a different conclusion is deduced, cannot be true.

The proposition here maintained is, that so much of the Sedition Bill as prescribes a punishment for libels is not warranted by the Federal Constitution.

To demonstrate this proposition to be true. I have recourse to the following syllogism.

1. Congress possesses no power unless it be expressly given, or necessary to carry a given power into effect. See the 1st, 2d, and 3d postulates.

2. The power of prescribing a punishment for libels is not expressly given, nor necessary to carry a given power into effect.

3. Conclusion. Therefore so much of the Sedition Bill as prescribes a punishment for libels, is not warranted by the Federal Constitution.

Upon principles of fair and logical reasoning, those who advocate the constitutionality of the Sedition Bill, must admit the conclusion here stated, unless they controvert the truth of the first or second terms of the foregoing syllogism.

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The truth of the first term is controverted by some on the ground of the preamble to the Constitution—the words are, “We the people of the United States, *in order* to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of Liberty to ourselves and our posterity, *do ordain and establish this Constitution*, for the United States of America.”

From the language of this preamble, it has been contended, that Congress have a power, expressly granted, to pass any laws which in their opinion may tend to provide for the common defence, or promote the general welfare.*

The same inference has been drawn from the 8th Section of the 1st article of the Constitution, which declares, “that Congress shall have power to lay and collect taxes, duties, excises, and imposts to pay the debts and provide for the common defence and general welfare of the United States.”†

Arguments are sometimes brought forward in discussion, the refutation of which requires more patience than skill—of this description is the argument now stated.

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* See Sewall's Speech on the Sedition Bill.

† See Otis and Bayard's Speeches on the Alien Bill.

As to the Preamble. The special reply to this argument is, that the preamble to a statute or constitution, which is the supreme statute, is no part of it. This is not mentioned as a principle of common law, but as a principle of common sense; a preamble states the general objects of the law of the constitution, and the articles which follow prescribe the means by which, and by which only, the attainment of these objects is to be pursued; the preamble can neither enlarge nor restrain the body of the act; it is in fact, nothing more than a declaration of objects; the constitution or law, is a specification of means. The preamble to the Constitution therefore says, in substance, "We the people of the United States in order to promote the general welfare, *do ordain this Constitution*:"—that is, "we do ordain this Constitution, in order to promote the general welfare." Language cannot be more plain. The Constitution is unequivocally announced as the instrument or mean by which the general welfare is to be promoted.

As to the 8th Section of the 1st article. The special reply to the argument founded on this section is, that the plain, grammatical meaning of the sentence, even taken by itself, and without any reference

to the uniform tenor of the Constitution, forbids the inference before mentioned. The Constitution by the words of this Section, meant to give not a general power to provide for the general good of the union, but the special power of laying and collecting taxes and duties, *for the purpose* of paying the debts and providing for the general welfare. According to this construction, a special power is given for a general purpose, in other words for the general good, which is in truth the purpose for which all power is granted; but according to the construction contended for by the advocates of the Sedition Bill, the same sentence which gives a special power, also gives a general power, which renders the special delegation of power useless. Which of these two constructions is the most rational, is a question that is not supposed to be in the smallest degree doubtful.

It seems clear then that a fair construction of the preamble, and of the 8th section of that article, considered in themselves, does not warrant the doctrine maintained by the friends of the Sedition Bill, that Congress possesses a general power to provide for the welfare of the Union. This doctrine appears not only not warranted by the particular clauses
relied

relied on, but absurd, when these clauses are taken into view with all the other clauses of the Constitution.

It has been already stated, that in each of the several states, the local and municipal regulations which were thought expedient had been adopted. With these the people were satisfied. When, therefore, a federal government was deemed necessary by the people, it would not be their intention or wish that the federal government should make laws on any subject, on which satisfactory laws were already made, or might be made, at the discretion of their representatives. A federal constitution *could not be necessary* for any purpose completely within the reach of state legislation: and, therefore, general powers could not be intended to be given.

It is a sound principle, that all parts of a law or writing are to be taken together, and that such a construction ought to be adopted, if possible, as will allow every part some meaning and operation. Now, if the preamble, or the 8th sec. of the 1st article, confers on Congress a general power to do what they may think right; those parts of the constitution which delegate special powers are unmeaning and without operation. On the other hand, if

the preamble be regarded in its true light, as a declaration of objects; and if the 8th section of the 1st article be considered as only giving a special power for a general purpose, every other clause and sentence of the constitution, will have a meaning and effect. This latter construction, therefore, *must* be adopted.

Again, if Congress possesses a general power to promote the general welfare, if constitutionality and expediency be convertible terms, what meaning is to be given to the 12th amendment, which declares, that "powers not delegated to the United States, nor prohibited to the states, shall remain with the states respectively, or with the people." This language is so irrational and absurd, unless there are some powers which are not delegated, that it affords *conclusive* evidence, of an universal conviction, throughout the states, and in Congress, that this *general power* did not exist.

Further, if it was really meant that a general power should be given to Congress, why were specific powers enumerated and granted? This enumeration is made with a degree of accuracy and precision, absolutely ridiculous, if a general power was meant to be given. Surely, if such had been the object, plain words, which

which men of the plainest capacity might comprehend, and about which there could be no doubt, might have been, and would have been selected for the purpose. Surely, if such had been the object, men of common honesty, and common understanding, after expressing in plain words what their object was, would not have employed themselves in so idle and useless a task as the enumeration of special powers, but would have proceeded directly to mark out the different departments of government, and to decide among these departments the general powers meant to be bestowed.

Again, we have seen that the state governments possess general powers of legislation. They may do every thing which tends to promote the welfare of the respective states, unless expressly prohibited by the state or federal constitutions. Now, if Congress possesses general powers of legislation also, over the people of the United States, it is manifest that we have a government within a government, one of which must inevitably perish. Arguments leading to a conclusion so monstrous must be erroneous.

This last observation may be completely illustrated by the law in question. The state governments have yet a right to pre-
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scribe a punishment for slander, which effects the reputation of individuals, whether this slander be by speech, writing, or printing. Before the federal government was formed they possessed this power, and must yet retain it, unless it has been surrendered. No man, however, has yet said nor can it be said, that this power may not be legally and constitutionally exercised by the states. Suppose then that the legislature of Pennsylvania should pass a law, prescribing a fine of fifty dollars only, without any imprisonment, for defaming any individual by means of the press. The officers of the general government are nothing more or less than individuals, and are bound by the general expression of a law as well as other people. By what law would a libeller of the President be tried? By the state law, by the congressional law, or by both? This question, difficult as it is, must be answered by those who advocate the general power of the government of the United States, without controverting the general powers of the state legislatures. This, however, never having yet been done, it is presumed will not be done.

Finally, no position can be true from which error or absurdity can be fairly deduced. If Congress possesses a general power

power to promote the welfare of the union, there is no limitation to this power, but their own discretion. They may exercise, like the state governments, every power except those which they are expressly forbidden to exercise. They are forbidden to grant titles of nobility, but they are *not* forbidden to pass laws by which a powerful aristocracy might be created. They might pass a law establishing in America the system of entails, by which the aristocracy of Britain, in spite of ostentation, luxury, and profusion, has been maintained for so many ages. But bold as the spirit of usurpation may be, this doctrine has never yet been explicitly avowed. It is believed to be too absurd, ever to be explicitly avowed; and yet it must be avowed, or at least admitted, by those who advocate the general power of the government of the United States.

But others more artful, though not more formidable, contend, that it is a principle of obvious policy and common sense, that every government should have within itself the means of self preservation; that the power of punishing libels on the government and its officers is essential to the preservation of the government, and that therefore the general government possesses the power of punishing libels.

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This argument is exhibited in its best form, but when examined, it cannot mislead. The first branch of the proposition is neither admitted, nor denied to be true. It is contended to be immaterial and unconnected with the subject in debate. The question is not, what powers ought a government to possess, but what powers does the government now existing possess? The first question was determined by the Convention in 1788, and the Congress in 1789, the last is to be determined by the people now. The first question arises, when a constitution is about to be formed, the latter, after it is formed. This part of the proposition, therefore, being immaterial, the reasoning founded on it cannot be conclusive. What, in truth, can be more repugnant to all the rules of logic, than the attempt to prove that a power *has been* granted, by arguments to shew that *it ought to have been* granted.

When the first term of any regular argument is proved to be untrue, or shewn to be immaterial, it is neither necessary nor proper to controvert the second, because, whether right or wrong, the conclusion if correctly deduced, must be untrue or immaterial. I will not, therefore, deviate at this time, from the plan of strict discussion, which is announced in the first

first paragraph, to prove, that the power of punishing libels, *however important to the men of government*, is of no consequence to the government itself.

There remains only one more argument in favor of the sedition bill. This is noticed here, not because it is worthy of notice, but because it affords a complete specimen of the *acute and logical reasoning*, by which this odious measure has been vindicated. It is conceded, says Mr. Otis, that government has a right to punish sedition or insurrection; it therefore has a right to punish every thing which may lead to sedition or insurrection.

The force of this argument may be destroyed by exhibiting it in a regular form, and applying it to the subject on which it was urged.

1. Congress has a right to punish sedition and insurrection. This is conceded to be true.

2. Libels lead to sedition and insurrection. Now this is not true; nor does Mr. Otis attempt to prove it to be true. But, whether true or not, it is immaterial. The affirmation here ought to be, not libels lead to, but "libels are acts of sedition, or insurrection" and then the conclusion would regularly follow.

3. That

3. That Congress has a right to punish libels. But neither Mr. Otis nor any other man will say, that any libel is an act of sedition or insurrection, or even a breach of the peace.

It deserves farther to be remarked here, that the power of punishing sedition is not expressly given to Congress: it is admitted, however, to belong to Congress, because it is *necessary* to carry the laws themselves passed, in conformity to the constitution, into effect. The power of punishing libels, not being given, can be claimed like the power of punishing sedition, only on the ground of necessity. This carries us back to the question formerly put, what power expressly given to Congress is ever *aided* by the power of punishing libels?

According to Mr. Otis if a government has a power to punish one offence, it has of course a right to punish all acts which may lead to that offence. In other words, if it has a power to punish one offence, it has of course a power to punish twenty offences, however different in name and nature. Under this system of reasoning, if the general government was authorised to punish the murder of a man in the service of the United States, it would have of course a right to punish an insult, because

insults

insults lead to quarrels, and quarrels lead to murder. Various other cases might be put which would expose the fallacy of reasoning like this ; but it is already sufficiently exposed. The argument which implies the power of punishing libels, from the power of punishing sedition, which is in itself only an *implied* power, must be condemned as soon as it is understood, even if it could be shewn that libels do lead to sedition. But they do not lead to it. This negative position, it is not necessary now to prove ; the contrary being affirmed by Mr. Otis ought to be proved by him.

It was before mentioned, that there was an universal conviction in the United States, that general powers of legislation did not belong to Congress. The 12th amendment was offered as conclusive evidence of the truth of this assertion. If then the people of the United States really supposed that Congress possessed only the powers delegated, expressly, or by fair and necessary construction, and it turns out that Congress possesses a power never meant to be bestowed, in consequence of certain general expressions, the force of which was not accurately estimated, what man, who pretends either to integrity or

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republicanism, will dare to say that he will carry such a power into effect ?

The principle on which so much of the sedition bill as prescribes a punishment for libels, is declared to be unconstitutional, having been it is believed, clearly explained and established, and the principle on which the advocates of that measure rely, having been shewn to be unsound in itself and absurd in its consequences ; the first part of my undertaking ought to be considered as performed. But many observations have been made concerning the common law of England, and the force which it has in the United States, some notice ought to be taken of them here.

It has been alledged by some, that the common law of England is in force in the United States, and that libels are an offence at common law, and were punishable even before the Sedition Bill. Judge Peters it is said committed Mr. Bache, the late Editor of the Aurora, on this ground.

Before this doctrine is examined, there is one remark which deserves attention. A legislative act has been performed : it is urged, that this act is not warranted by the Constitution of the United States. The friends of the measure say that it is constitutional, and to prove their assertion
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they refer you not to the constitution itself, by which alone power, general or special, can be claimed, but to the common law of England!!

To prove that Congress has a right to pass a law to punish libels, they say that there already exists a law in the country, by which libels may be punished! The system of moderation, which was adopted at the commencement of these papers, and from which there has been as yet no deviation, prevents me from speaking of arguments like these in the terms which they deserve.

If the common law of England be in force in the United States, it must be in force because it is declared to be so by the constitution, or by some law of the United States—no *municipal* system of law can be of any authority here, unless expressly adopted in one of these two ways. The constitution is silent on the subject—this silence was wise; because, a system of law adopted by the constitution could not be changed by any act of ordinary legislation; nor is it adopted by any law of the United States; and if it had been so adopted, the question would be precisely the same that is now discussed. For if Congress have no right to pass a law punishing libels, it follows that they have

no right to adopt a system of laws, one of which, prescribes a punishment for libels.

I repeat that no law can be in force here, unless adopted in one of the two ways just mentioned. Law is a rule of action prescribed by the supreme power of a state. The supreme power of the United States has not declared the common law of England to be in force here: therefore, it is not in force here. It will be observed, that I speak not here of the law of nations.

If there be a passage through which the municipal regulations of one country, can get into another country, and acquire authority in it, without the express consent of the people, those who have announced the migration of the common law of England into the United States will inform the public, whether it was accompanied in its voyage by the civil law or not. If this *singular* invasion of our country is not firmly repelled, we may expect depredations on our state institutions from all the codes of the eastern world. The compendious and energetic system by which the Sultaun keeps his slaves in peace, may at this moment be on its way to America, and on its arrival here will be precisely of as much force as the common law of England.

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The opinion that the common law of England is in force in the United States, has been demonstrated to be erroneous, provided it be true that law is a rule of action *prescribed* by the supreme power.

The opinion is not only erroneous in itself, but directly repugnant to the plain meaning and words of the Constitution, which expressly declares, Art. 6. that, "this Constitution and the Laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the Supreme Law of the land." The common law is totally unnoticed.

Again, if the common law of England be in force in the United States, and is to be the guide by which the federal judges shall conduct themselves, what becomes of the various changes in the common law which have been effected at different times by the several state legislatures? are the improvements on the common law, which have been made in the state of Virginia, for the accommodation and convenience of the people, to be entirely done away without their knowledge or consent? Is the right of primogeniture revived? Or, is it only the criminal law that is in force here? These are two important

portant points, among a thousand others, on which information is required from the advocates of the common law.

The Congress of the United States, so far from adopting the common law of England, which, it must be again observed, they had not a general power to adopt, have expressly enacted that the laws of the several states, except where the constitution, treaties, or statutes of the United States, shall otherwise require or provide, shall be regarded as rules of decision in trials of common law in the courts of the United States in cases where they apply. See Act passed 24th Sept. 1789.

On this subject, there is one argument, which in itself is absolutely conclusive. The Congress of the United States have a power to pass a law concerning libels or not. If they have this power, and exercise it, by prescribing a punishment for libels, the courts of the United States must be governed by the law of the United States, and cannot exercise any common law jurisdiction on the subject. But if Congress does not possess the right to pass a law concerning libels, then the arguments which shew that the courts of the United States have a jurisdiction over libels, also shew that their jurisdiction extends to subjects, on which Congress can-

not legislate. Thus the power of the judiciary will embrace objects beyond the reach of the legislature, and of course the laws by which the judiciary think proper to be governed, must remain forever unchanged. Surely it will be at once admitted, that every argument whose object is to prove, that the judiciary power is not co-extensive with the legislative power, but *more* extensive, must be unsound.

This admission will be made without hesitation, by every one who understands either the general principles of government, or the plain meaning of our own constitution, which says, Art. 3, Sect. 2. "The judicial power of the United States shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made under their authority." These are the great subjects on which the judicial power of the United States is to be exercised according to the express direction of the Constitution. The other cases to which their authority is declared to extend, are totally unconnected with common law jurisdiction.

But, it is said, the same clause declares, that the judicial power of the United States shall extend to "controversies to which the United States shall be a party."

"ty." From this some have inferred, that the federal judiciary have jurisdiction over every offence against the United States; because the United States constitute the party injured.

It has been already shewn, that the common law is of no force in the United States; now if the courts claim a jurisdiction over every case, in which they may think that the United States are a party, by what law will they define and punish the offence? If the laws of the United States are silent, there is no law by which the offenders can be tried. But if the laws of the United States are not silent, if Congress passes a law, by which an offence against the United States is defined and punished, by which the United States are in any case constituted a party, then the question recurs, as in the present instance, whether Congress had a constitutional right to pass such a law or not. The question therefore about the extent of the legislative power of Congress, is the only question, that ought to be discussed.

This question, it is presumed, has been now fairly and fully discussed, and the result is that so much of the Sedition Bill as relates to Libels is not warranted by the Constitution of the United States.

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AN ESSAY

ON THE
LIBERTY OF THE PRESS.

PART II.

It is the object of the following observations, to demonstrate, that so much of the sedition bill, as relates to *printed libels*, is expressly forbidden by the constitution of the United States. This question, in strictness, ought not to be discussed; because, if Congress have not power given, either expressly, or by necessary *implication*, to pass the law under consideration, it is totally immaterial whether they are forbidden to pass it or not. But as the "freedom of the press," has never yet been accurately defined, and as there is no subject in which the welfare of society is more essentially concerned, my original undertaking shall be fully performed.

The words of the constitution, which contains the express prohibition here relied

lied on, are, "Congress shall make no law abridging the freedom of speech or of the press." See the third article of the amendments, &c.

Before any precise construction is put on these words, "freedom of the press," an argument in favor of the foregoing propositions presents itself, which to me seems conclusive.

The federal government had been organised, and its operation had commenced, some time before the third article of the amendment became a part of the constitution. During this period, the press was free, from any control. It is a fact, that no law was passed by Congress to control it. It is a truth already proved, that no law could be passed by Congress to control it; and it is also a truth, already proved, that there neither was nor could be any *other* law, by which it could be controlled. Before the amendment was adopted, therefore, the press was free.—The measures of the government were subjects of general discussion, and were stated, sometimes truly, sometimes falsely, at the discretion of the printer. Nothing that was said, however false, however scandalous, could be noticed by the government. In this state of things, a clause is added to the constitution, which de-

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clares that the freedom of the press shall not be abridged. In other words, the press shall continue to enjoy that total exemption from legislative control, which at this moment it possesses. The law, therefore, which abridges this exemption, is expressly forbidden.

The subject before us, hath furnished the materials for much discussion; and it has been so often said to be impossible to draw the line between the freedom and licentiousness of the press, that the attempt has never been made. The legal and political writers in England contend, however, that this line must be drawn; but, they admit, that the exact degree of longitude has not yet been discovered.

This uncertainty in the law is well adapted to the situation of the British government. It enables the minister to act and punish as times and circumstances require; without subjecting himself to the odium of having transgressed the law. But, however important this uncertainty may be in a country, where privilege and monopoly form the basis of the government, in the United States it is disgraceful. In a republican government the people ought to know, the people have a right to know, the exact, the precise extent

tent of every law, by which any individual may be called before a court of justice.

Fortunately for the people of the United States, the question which has perplexed the politicians and lawyers of England, does not exist here. The constitution having declared, that the freedom of the press shall not be abridged, has, in fact, pronounced that no line of discrimination shall be drawn. For, if the freedom of the press is not to be abridged, and if no man can tell where freedom stops, and licentiousness begins, it is obvious that no man can say, to what extent a law against licentiousness shall be carried. It follows, then, that no law can be made to restrain the licentiousness of the press.

The words, "freedom of the press," like most other words, have a meaning, a clear, precise, and definite meaning, which the times require, should be unequivocally ascertained. That this has not been done before, is a wonderful and melancholy evidence of the imbecility of the human mind, and of the slow progress which it makes, in acquiring knowledge even on subjects the most useful and interesting.

It will, I presume, be admitted, not only that the words in question have a meaning; but that the framers of the amendment

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ment containing these words, meant something when they declared, that the freedom of the press should not be abridged.

To ascertain what the "freedom of the press" is, we have only to ascertain what freedom itself is. For, surely, it will be conceded, that freedom applied to one subject, means the same, as freedom applied to another subject.

Now freedom is of two kinds, and of two kinds only: one is, that absolute freedom which belongs to man, previous to any social institution; and the other, that qualified or abridged freedom, which he is content to enjoy, for the sake of government and society. I believe there is no other sort of freedom in which man is concerned.

The absolute freedom then, or what is the same thing, the freedom, belonging to man, before any social compact, is the power, uncontrolled by law, of doing what he pleases, provided he does no injury to any other individual. If this definition of freedom be applied to the press, as surely it ought to be, the press, if I may personify it, may do whatever it pleases to do, uncontrolled by any law, taking care however, to do no injury to any individual. This injury can only be by slander or de-

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famation, and reparation should be made for it in a state of nature, as well as in society.

But freedom in society, or what is called civil liberty, is defined to be, natural liberty, and so far restrained by law as the public good requires, and no farther. This is the definition given by a writer, particularly distinguished for the accuracy of his definitions, and which perhaps cannot be mended. Now let freedom, under the definition, be applied to the press, and what will the freedom of the press amount to? It will amount precisely to the privilege of publishing, as far as the legislative power shall say, the public good requires: that is to say, the freedom of the press will be regulated by law, in the same manner as freedom on other subjects is to be regulated by law. If the word freedom was used in this sense, by the framers of the amendment, they meant to say, Congress shall make no law abridging the freedom of the press, which freedom, however, is to be regulated by law. Folly itself does not speak such language.

It has been admitted by the reader, who has advanced thus far, that the framers of the amendment meant something. They knew, no doubt, that the powers granted to Congress, did not authorize any

any control over the press, but they knew that its freedom could not be too cautiously guarded from invasion. The amendment in question was therefore introduced. Now if they used the freedom under the first definition, they did mean something, and something of infinite importance in all free countries, the total exemption of the press from any kind of legislative control. But if they used the word freedom, under the second definition, they meant nothing, or nonsense, which is worse than nothing; for if they supposed that the freedom of the press, was absolute freedom, so far restrained by law as the public good required, and no farther, the amendment left the legislative power of the government on this subject, precisely where it was before. But it has been already admitted that the amendment had a meaning: the construction therefore which allows it no meaning is absurd, and must be rejected.

This argument may be summed up in a few words. The word "freedom" has a meaning. It is either absolute, that is, exempt from all law, or it is qualified, that is regulated by law. If it be exempt from the control of law, the Sedition Bill which controls the "freedom" of the press, is unconstitutional. But if

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it be regulated by law, the amendment which declares that Congress shall make no law to abridge the freedom of the press, which freedom however may be regulated by law, is the grossest absurdity, that ever was conceived by the human mind.

That by the words "freedom of the press" is meant a total exemption of the press from legislative control, will further appear, from the following cases, in which it is manifest, that the word freedom is used with this signification and no other.

It is obvious in itself, and it is admitted by all men, that freedom of speech, means the power uncontrolled by law, of speaking either truth or falsehood at the discretion of the individual, provided no other *individual* be injured. This power is, *as yet*, in its full extent in the United States. A man may say every thing which his passion can suggest, he may employ all his time and all his talents, if he is wicked enough to do so, in *speaking* against the government matters that are false, scandalous, and malicious, but he is admitted by the majority of Congress to be sheltered by the article in question, which forbids a law abridging the freedom of speech. If then freedom of speech means, in the construction of the constitution, the

the privilege of speaking *any thing* without control, the words freedom of the press, which form a part of the same sentence, mean the privilege of printing *any thing* without control.

Happily for mankind, the word "freedom" begins now to be applied to religion also. In the United States it is applied in its fullest force, and religious freedom is completely understood to mean the power uncontrolled by law of professing and publishing any opinions on religious topics, which any individual may choose to profess or publish, and of supporting those opinions by any statements he may think proper to make. The fool may not only say in his heart, there is no God, but he may announce if he pleases his atheism to the world. He may endeavor to corrupt mankind, not only by opinions that are erroneous, but by facts which are false. Still however he will be safe, because he lives in a country where religious freedom is established. If then freedom of religion, will not permit a man to be punished, for publishing any opinions on religious topics, and supporting those opinions by false facts, surely freedom of the press, which is the medium of all publications, will not permit a man to be punished, for publishing any opinion on

any subject, and supporting it by any opinion whatever.

Again, the 6th Section of the 1st article of the Constitution of the United States declares, that the members of the Senate and House of Representatives, shall not be questioned, in any other place, for any speech or debate in either house. The object of this clause is, manifestly, to secure to the members, freedom of speech and debate. Of this there can be no doubt. But how is this freedom secured? It is secured, in the only way, in which perfect security can be given, and that is by a total exemption from the control of any law, or the jurisdiction of any court. Thus the meaning of the word freedom, is precisely and unequivocally established by the constitution itself.

The power which each house has over its own members affords no argument against the inference deduced from the foregoing section of the constitution. The power of punishing, and expelling a member, is only to be exercised, in case of "disorderly behaviour."

The word freedom when applied to debate is understood precisely in the same way in the British parliament. Fox, Sheridan, and Grey indulge themselves constantly in the House of Commons, in the
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use of expressions, concerning the government, much more violent than those for which private persons have been sent to Botany Bay. In fact, freedom of debate in parliament, is secured, by Statute 1st William and Mary 2d, in terms similar to those used in the Constitution of the United States.

I contend therefore, and it appears clear, that if the words freedom of the press, have any meaning at all, they mean a total exemption from any law making any publication whatever criminal. Whether the unequivocal avowal of this doctrine in the United States would produce mischief or not, is a question which perhaps I may have leisure to discuss. I must be content here to observe, that the mischief if any, which might arise from this doctrine, could not be remedied or prevented, but by means of a power fatal to the liberty of the people.

That the real meaning of the words "freedom of the press," has been ascertained by the foregoing remarks, will appear still more clearly, if possible, from the absurdity of those constructions which have been given by the advocates of the sedition bill.

The construction clearly held out in the bill itself, is, that it does not extend to the
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privilege of printing facts, that are false. This construction cannot be correct, as it plainly supposes that "freedom," extends only as far as the power of doing what is morally right. If, then, the freedom of the press can be restrained to the publication of facts, it follows, inevitably, that it may also be restrained to the publication of true opinions. There is truth in opinion, as well as in fact. Error in opinion may do as much harm, as falsity in fact: it may be as morally wrong, and it may be propagated from motives as malicious. It may do more harm, because the refutation of an opinion which is erroneous, is more difficult than the contradiction of a fact which is false. But the power of controlling opinions has never yet been claimed; yet it is manifest that the same construction, which warrants a control in matters of fact, does the same as to matters of opinion. In addition to this, it ought to be remarked, that the difficulty of distinguishing in many cases between fact and opinion, is extremely great, and that no kind of criterion is furnished by the law under consideration. Of this more, perhaps, will be said hereafter.

Again, if the congressional construction be right, if the freedom of the press consists in the full enjoyment of the privilege

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of printing facts that are true, it will be fair to read the amendment, without the words really used, after substituting those said by Congress to have the same import. The clause will then stand thus: "Congress shall make no law abridging the right of the press, to publish facts that are true!" If this was the real meaning of Congress, and the several states, when they spoke in the state constitutions, and in the amendment of the "freedom of the press," the very great solicitude on this subject displayed throughout the continent, was most irrational and absurd. If this was their meaning, the "palladium" of liberty is indeed a "wooden statue," and the bulwark of freedom is indeed a despicable fortification of paper. The officers of the government would have a right to invade this fortification, and to make prisoners of the garrison, whenever they thought that there was a failure in the duty of publishing only the truth, of which failure persons chosen by the government are to judge. This is too absurd even for ridicule.

That such was not the meaning of the convention of Virginia is manifest. They solemnly protest against any kind of legislative control, and declare, that the freedom

dom of the press is not to be restrained or modified by any law whatever.

This venerable and enlightened assembly had too much wisdom to avow a meaning, so totally incompatible with the real object of their wishes. They knew that there never was a government in the world, however despotic, that dared to avow a design to suppress the truth: they know that the most corrupt and profligate administrations, that ever brought wretchedness and oppression upon a happy and free people, speak in their public acts the language of patriotism and virtue only, and that, although their real object is to stop inquiry, and to terrify truth into silence, the vengeance of the law *appears* to be directed against falsehood and malice only: in fact, they know, that there are many truths, important to society, which are not susceptible of that full, direct, and positive evidence, which can alone be exhibited before a court and jury:

That men might be, and often would be deterred from speaking truths, which they could prove, unless they were absolutely protected from the trouble, disgrace, losses, and expence of a prosecution:

That

That in the violence of party spirit which government knows too well how to produce, and to inflame evidence ; the most conclusive, might be rejected, and that juries might be packed, " who would find Abel guilty of the murder of Cain :"

That nothing tends more to irritate the minds of men, and disturb the peace of society, than prosecutions of a political nature, which like prosecutions in religion, increase the evils, they were, perhaps, intended to remove :

They knew that the licentiousness of the press, though an evil, was a less evil than that resulting from any law to restrain it, upon the same principle that the most enlightened part of the world is at length convinced, that the evils arising from the toleration of heresy and atheism, are less, infinitely less, than the evils of persecution :

That the spirit of inquiry and discussion, was of the utmost importance in every free country, and could be preserved only by giving it absolute protection, even in its excesses:

That truth was always equal to the task of combating falsehood without the aid of government ; because in most instances it has defeated falsehood, backed by all the power of government:

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That truth cannot be impressed upon the human mind by power, with which, therefore, it disdains an alliance, but by reason and evidence only.

They knew the sublime precept inculcated by the act establishing religious freedom, that "where discussion is free, error ceases to be dangerous:" and, therefore, they wisely aimed at the total exclusion of all Congressional jurisdiction.

But, it has been said, that the freedom of the press, consists not in the privilege of printing truth; but in an exemption from previous restraint, and as the sedition bill imposes no previous restraint, it does not abridge the freedom of the press. This *profound* remark is borrowed from Blackstone and De Lolme, and is gravely repeated, by those who are weak enough to take opinions upon trust.

If these writers meant to state what the law was understood to be in England, they are correct. Even if they meant to state what the law ought to be in England, perhaps they are still correct; because it is extremely probable, that a press absolutely free, would in the short course of one year "humble in the dust and ashes," the "stupendous fabric," of the British government. But this definition does not deserve to be transplanted into

into America. In Britain, a legislative control over the press, is, perhaps essential to the preservation of the "present order of things;" but it does not follow, that such control is essential here. In Britain, a vast standing army is necessary to keep the people in peace, and the monarch on his throne; but it does not follow that the tranquillity of America, or the personal safety of the President, would be promoted by a similar institution.

A single remark will be sufficient to expose the extreme fallacy of the idea, when applied to the constitution of the United States. If the freedom of the press consists in an exemption from previous restraint, Congress may, without injury to the freedom of the press, punish with death any thing *actually* published, which a political inquisition may chuse to condemn.

But on what ground is this British doctrine about the freedom of the press introduced here? In Britain, the parliament is acknowledged to be omnipotent. It has exercised this omnipotence, and converted three years into seven years. In Britain there is no constitution, no limitation of legislative power; but in America, there is a constitution, the power of the legislature is limited, and the ob-

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ject of one limitation is to secure the freedom of the prefs.

If this doctrine is avowed here, under the idea that the common law of England is in force in the United States, even this idea will be of no avail. The common law knows nothing of printing or the liberty of the prefs. The art of printing was not discovered, until towards the close of the 15th century. It was at first in England, a subject of star-chamber jurisdiction, and afterwards put under a licenser by statute. This statute expired just before the commencement of the present century. Before this event, the rights of the prefs, were at the mercy of a single individual. There can be no common law, no immemorial usage or custom concerning a thing of so modern a date.

The freedom of the prefs, therefore, means the total exemption of the press from any kind of legislative control, and consequently the sedition bill, which is an act of legislative control, is an abridgment of its liberty, and expressly forbidden by the constitution. Which was to be demonstrated.

In the foregoing pages, I have kept clear of authorities and quotations, even when expressly in point. These can be resorted to without my help. I do not contemn

contemn the opinions of others; but discussion is endless, where authorities are relied on. I have kept clear too, of personal remarks. These would have been justified by the manners of the times, and to many, would have been more acceptable than argument itself. But the influence of truth is not aided by invective and reproach. I have addressed myself therefore to the understanding only;—and I hope, that the sacred cause of liberty and truth, if not promoted by the arguments, has not been disgraced by the temper or language of

HORTENSIUS.

Virginia, January 1799.

